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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 799.

RICHARD K. GORDON ET AL.,
PETITIONERS,
v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Table of Contents.

Statement of the case	1
Statement of facts	3
Introduction	3
Summary of the evidence	5
Summary of argument	13
Argument	15
A. There is no evidence of bias on the part of the grand jury	15
B. Conduct of the voir-dire examination of trial jurors by the judge does not raise a constitutional question	19
C. There was abundant ground for founding territorial jurisdiction in Massachusetts and venue in Suffolk County	22
D. No constitutional question is raised by the action of the Supreme Judicial Court in overruling a prior decision which had clearly misapplied a state statute concerning venue	25
E. The evidence was sufficient to support the convictions	29
F. The petition requests that certiorari issue to the wrong court	30
Conclusion	31
Appendix I	32

Table of Authorities Cited.

Cases.

Beazell v. Ohio, 269 U.S. 167, 46 S.C. 68	25
Beck v. Washington, 365 U.S. 866	17

Beck v. Washington, 369 U.S. 541 16, 17, 18, 19

Bouie v. City of Columbia, 378 U.S. 347, 84 S.C. 1697 25, 28

Buchalter v. New York, 319 U.S. 427 20, 25, 29

Commonwealth v. Friedman, 188 Mass. 308 26, 27, 28

Commonwealth v. Geagan, 339 Mass. 487, 159 N.E. 2d 870; cert. den. 361 U.S. 895, 80 S.C. 200, 4 L. Ed. 2d 152 21

Commonwealth v. Green, 302 Mass. 547 22

Commonwealth v. Iannello, 344 Mass. 723 22, 26n.

Commonwealth v. Kelley, 184 Mass. 320 22, 26n.

Commonwealth v. King, 202 Mass. 379 22, 26n.

Commonwealth v. Mulrey, 170 Mass. 103 30

Commonwealth v. Parker, 2 Pick. 550 22

Commonwealth v. Parker, 165 Mass. 526 24

Commonweatlh v. Quin, 5 Gray 478 22

Commonwealth v. Rand, 7 Met. 475 24

Cook v. United States, 138 U.S. 157, 11 S.C. 268 25

Crocker v. Justices of the Superior Court, 208 Mass. 162 22

Darcy v. Handy, 351 U.S. 454 19

Frank v. Mangum, 237 U.S. 309, 35 S.C. 582 28n.

Geagan v. Gavin, 292 F. 2d 244; cert. den. 370 U.S. 903, 82 S.C. 1247, 8 L. Ed. 2d 399 21

Geagan v. Gavin, 181 F. Supp. 466 21

Geagan v. Massachusetts, 361 U.S. 895, 370 U.S. 903 21n.

Gray v. Cook, 135 Mass. 189 30

Gut v. State of Minnesota, 9 Wall. 35 25

Ross v. Oregon, 227 U.S. 150, 33 S.C. 220 28n.

STATUTES, ETC.

U.S. Constitution, Fifth Amendment 19
Mass. Constitution, Declaration of Rights, art. 12 17n.

G.L. (Ter. Ed.) c. 234, § 28 14, 19, 20
G.L. c. 266
§ 30 23n., 26
§ 33(1) 22, 23, 26n.
§ 34 26n.
G.L. (Ter. Ed.) c. 277
§ 5 18
§ 39 22
§ 41 22
§ 58 24
§ 59 24n., 26, 28
§ 79 22
G.L. c. 278, §§ 33A-G 2, 30
G.L. c. 278, § 33E 30
Mass. Acts of 1958, c. 606 6n.

Federal Rules of Criminal Procedure, Rule 24(a) 20n.
Rules for the Regulation of Practice before the Supreme Judicial Court
Rule 13 27
Rule 16 26

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Statement of the Case.

On May 31, 1962, two indictments were returned by a grand jury sitting in Suffolk County, Massachusetts, which charged petitioners[1] and two other defendants[2] with lar-

[1] Both petitioners are lawyers and members of the Massachusetts bar. Petitioner Gordon is also a District Court judge in Essex County. Gordon has suspended himself from his judicial duties pending the outcome of this case.

[2] The other two defendants were George Lewis Brady and Francis W. Kiernan. Brady has not been tried on the indictments involved in this petition (or on other indictments returned at the same time against Brady and others, on which there have been two convictions and one acquittal), because of the trial court's finding that Brady was incompetent to stand trial. Kiernan was convicted with petitioners in this proceeding but has not joined in this petition for certiorari.

ceny of $450,000 from the Massachusetts Parking Authority and with conspiracy to commit larceny from the Massachusetts Parking Authority.

Verdicts of guilty on both indictments were returned on April 16, 1963. Sentences were imposed on April 22, 1963.[3] On the same day the trial judge ordered that execution of the sentences be stayed, pending appeal of the convictions.

Appeals were taken to the Supreme Judicial Court of Massachusetts under Mass. G.L. c. 278, §§ 33A-33G,[4] to which the case had been ordered made subject by the trial judge (R. 5).[5] On October 5, 1964, the convictions were affirmed by the unanimous decision of the Supreme Judicial Court.

Thereafter the Commonwealth moved in the Superior Court (the trial court) for an order revoking the stays of execution; and petitioners moved in the same court for an order extending the stays of execution, pending petitions for certiorari to this Court. After hearing, the Commonwealth's motion was allowed; the petitioners' motions were

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[3] On the larceny indictment petitioners and Kiernan were sentenced to terms of two and one-half to three years at the Massachusetts Correctional Institution at Walpole, Massachusetts. On the conspiracy indictment they were sentenced to terms of two and one-half years at the Suffolk County House of Correction, to be served from and after the expiration of the sentences on the larceny indictment.

[4] These sections are the so-called "felony appeals" statute, under which the record on appeal includes a transcript of all the testimony at the trial and all the exhibits admitted in evidence.

[5] References to the Summary of Record will be made by the letter "R." followed by the page number. References to the transcript of testimony will be made by the letters "Tr.," followed by the page number. Exhibits will be referred to as "Ex.," followed by the exhibit number. References to the opinion of the Supreme Judicial Court, which is Appendix A to the petition, will be made by the letters "App. A," followed by the page number.

denied; and petitioners were ordered to commence serving their sentences forthwith.

Thereupon, petitioners applied to the Supreme Judicial Court for stays of execution, pending petitions for certiorari to this Court. After hearing, these applications were denied.

Petitioners then applied to this Court for stays of execution. This application was denied by Justice Goldberg on November 16, 1964.

The petition for certiorari was entered in this Court on December 31, 1964.

Statement of Facts.

Introduction.

There was evidence in this case that a conspiracy was formed early in 1959 by George Lewis Brady, chairman of the Massachusetts Parking Authority (Authority), and William F. Thompson, chairman of the board of The Foundation Company (Foundation), who was interested in obtaining for Foundation the contract to construct the garage which the Authority intended to build under the Boston Common. The object of the conspiracy was to steal money from the Authority.

Shortly after the conspiracy was formed, it was joined by Maurice A. Broderick, a New Hampshire lawyer and brother-in-law of Brady, and later by Kiernan and by petitioners Gordon and Simmers.

The crime contemplated by the conspiracy was to be committed in two stages: first, Foundation, which would receive the construction contract for the garage, was to receive a payment for work claimed to have been done by Foundation which in fact had not been done; second, Foundation was to pay the money over to Brady and the other

conspirators under the guise of legitimate payments for (*a*) a finder's fee, (*b*) an attorney's fee and (*c*) a subcontract for various items of work in the construction of the garage. The total kick-back to be made by Foundation came to $405,000.

After the mechanics of the conspiracy had been agreed upon, the Authority and Foundation entered into a contract for the construction of the garage, which provided in part that an initial payment was to be made to Foundation, for services rendered by Foundation before the signing of the contract, in the amount of $450,000 (in fact, the work done by Foundation before the signing of the contract was less than 10% of this amount). The construction contract was signed, among others, by Brady, after it had been approved by Kiernan, who was acting as consulting engineer (referred to as the "construction engineer") for the Authority. The $450,000 was paid to Foundation by the First National Bank of Boston (First National), acting as trustee of the Authority's construction fund, after the construction contract had been signed and after First National had received a requisition for this payment signed by Brady and certified by Kiernan.

After it received the $450,000, Foundation made the payments previously agreed upon to members of the conspiracy. A finder's fee, so-called, of $145,000 was paid to Kiernan (after passing through two straws furnished respectively by Broderick and by petitioner Gordon) and was then paid by Kiernan in whole or in part to Brady. A lawyer's fee, so-called, of $100,000 was paid to petitioners Gordon and Simmers. Neither Gordon nor Simmers performed legal services for Foundation. Similarly, $65,000 was paid by Foundation, under a so-called subcontract, to Granite State Realty and Construction Co., Inc. (Granite State), a New Hampshire corporation organized by Broderick. Granite State did not perform any work under the

so-called subcontract (indeed, Granite State was a paper corporation only, without any employees, equipment or other assets). The money paid ostensibly to Granite State ended up in the hands of petitioners Gordon and Simmers (App. A, 1160-1169).[6]

The first step in diverting the Authority's money to petitioners Gordon and Simmers and to other members of the conspiracy was the payment by the Authority of $450,000 to Foundation. Here is where the impact of the crime was felt. It was represented by members of the conspiracy that this payment was made to compensate Foundation for work done before the signing of the contract. However, there was evidence that this representation was false in two respects: first, the work done by Foundation before the signing of the contract was only a small fraction of this amount; second, the purpose of this payment (at least to the extent of $405,000) was to place money in the hands of Foundation so that Foundation could pay the money over to other members of the conspiracy.

Summary of the Evidence.

In view of the fact that the petition raises questions of the sufficiency of the evidence to support the convictions (on the theory that problems of due process and *ex post facto* laws under the United States Constitution are raised thereby), this brief will refer to the parts of the evidence which the Commonwealth believes are material.

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[6] The total kick-back agreed upon originally came to $405,000, as follows: $150,000 for the finder's fee; $100,000 for the lawyer's fee; $155,000 for the subcontract (App. A, 1162-1163). The amount actually paid was $310,000, as follows: $145,000 for the finder's fee; $100,000 for the lawyer's fee; $65,000 for the subcontract. The finder's fee was discounted $5,000 for early payment (App. A, 1167, n. 15), and $90,000 of the subcontract was never paid (App. A, 1169, n. 16).

Starting in the spring of 1959 a series of conversations began between Brady (who had been appointed recently as chairman of the Authority)[7], officers of Foundation and others, for the purpose of negotiating terms under which Foundation, in return for the award of the construction contract for the garage, would pay a kick-back to Brady and to others (App. A, 1161-1163).[8]

After the terms had been agreed upon, the arrangements for payment of the kick-back were spelled out in three predated letters signed by the president of Foundation on February 20, 1960. The first letter, predated to May 4, 1959, was addressed to a man named Edward Plourde and represented that Foundation would pay Plourde a finder's fee for work obtained in Massachusetts through Plourde's efforts (App. A, 1162; Ex. 16; Tr. 475-476). The amount of the finder's fee for the garage contract, according to the formula contained in this letter, was $150,000. However, Plourde had done nothing to bring the Parking Authority and Foundation together.[9] In fact, he was acting as a straw for Brady (App. A, 1162; Tr. 470-472; Tr. 686-694; Tr. 1007-1022). The second letter, predated to June 17, 1959, was addressed to Broderick and provided that Foundation would pay him $100,000 for legal services rendered for the garage job and other projects (App. A, 1162; Ex. 17; Tr. 476-477). In fact, no legal services were to be rendered by Broderick. The third letter, predated to February 11, 1960, was addressed to Granite State and recited that

[7] The Authority was created in 1958 by the Massachusetts legislature. Its purpose was to build, operate and maintain a garage under Boston Common (App. A, 1160-1161, 1173-1175). See Mass. Acts of 1958, c. 606; Ex. 6; Tr. 324-329.

[8] Tr. 915-925; Tr. 1040-1049; Tr. 1086-1104; Tr. 464-475; Tr. 653-658; Tr. 692-694; Exs. 15-17; Tr. 475-478.

[9] Plourde had been enlisted by Broderick.

Granite State would receive a subcontract from Foundation for four work items in the construction of the garage, totalling $155,000 (Ex. 15; Tr. 477-478). In fact, Granite State had no assets and was incapable of performing any work (App. A, 1163).[10]

On February 23, 1960, three days after the signing of the predated letters, the Authority held a meeting at its office in Boston, at which a series of resolutions were adopted. One resolution provided for the appointment by the Authority of Muzzillo and Tizian (represented by defendant Kiernan throughout the construction of the garage) as "construction engineer" to represent the Authority in accordance with the terms of the so-called "Bond Resolution" (Ex. 6; Tr. 324-331), which was adopted at the same meeting. In general, it was the duty of the construction engineer (Kiernan) to "approve the design, plans and specifications of the Project [Boston Common Garage] prior to construction of the Project and, on behalf of the Authority [to] supervise the construction of the Project and report weekly to the Authority on the compliance of such construction with the design, plans and specifications for the Project" (Ex. 6, § 709; Tr. 324-331). The Bond Resolution further provided that no obligation incurred for work done in the construction of the garage could be paid without a certificate, signed by the construction engineer, certifying that "such work was actually performed" (Ex. 6, § 406[c]; Tr. 324-331).

Another resolution, adopted at the same meeting, approved the form and substance of a contract between the Authority and Foundation. This contract provided that 6 per cent ($450,000) of the total contract price of $7,500,000 was to be paid to Foundation at the signing of the contract "*as payment for architectural and engineering services*

[10] Tr. 463-464, 478-479, 531-534.

heretofore rendered by the contractor in connection with the project" (App. A, 1163-1164; Ex. 7; Tr. 332-335). (Emphasis added.) In fact, at the time the contract was signed by the Authority and Foundation (March 2, 1960), the work done by Foundation came only to $35,246.44, less than 10 per cent of the initial payment[11] (App. A, 1165; Tr. 1359-1394; Exs. 71, 71-A; Tr. 1373-1379, 1393-1394, 1415-1416).

The various resolutions[12] adopted at the meeting of the Authority on February 23, 1960, were all signed by Brady. In addition, the proposed contract with Foundation, approval of which was voted at this meeting, had been approved previously by Kiernan in writing (App. A, 1163; Ex. 7; Tr. 332-335).

Once the various resolutions had been approved by the Authority, arrangements could be made to consummate the sale of the Authority's bonds, to sign the construction contract and to make the payment of $450,000 to Foundation which the construction contract called for. Accordingly, it was agreed that the closing, so-called, would be held on March 2, 1960, at the Chemical Bank, New York Trust Company (Chemical Bank), in New York City. Present at the closing were Brady, other members of the Authority, Kiernan, representatives of Foundation, representatives of the underwriter John Nuveen & Co. (Nuveen)

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[11] The difference between the initial payment to Foundation of $450,000 and the cost to Foundation of $35,246.44 at the time the contract was signed is $414,753.56, slightly in excess of the $405,000 which Foundation had agreed to pay as a kick-back.

[12] Other resolutions were adopted at this meeting, including a resolution approving a so-called "Purchase Contract" under which John Nuveen & Co. was to act as the underwriter for the sale of the Authority's bonds (Tr. 368-371; Tr. 1486-1498; Exs. 10, 11; Tr. 362-371) and a resolution appointing First National as construction-fund trustee (Ex. 9; Tr. 343-344).

and representatives of various banks including First National (which was to act as trustee of the Authority's construction fund). At this meeting the construction contract was signed by Brady, Kiernan and others. It provided (as did the contract previously approved in Boston by Brady and Kiernan) that "Six per cent [*i.e.*, $450,000] of the total of the above amount [*i.e.*, the $7,500,000 contract price] shall be paid to the contractor on the effective date of this contract *as payment for architectural and engineering services heretofore rendered by the Contractor in connection with the project.*"[13] (Emphasis added.) After the construction contract had been signed, Brady delivered the Authority's bonds to Nuveen and received in return two checks, one of which (for $7,732,800) was endorsed over to First National and then deposited in Chemical Bank, to the account of First National as trustee of the Authority's construction fund. Thereupon requisition 1 to First National was signed by Brady on behalf of the Authority. It contained two payment items, one of which was for $450,000 to Foundation in "*Payment for architectural and engineering services as required by Construction Contract.*" (Emphasis added.) Attached to this requisition was a certificate signed by Kiernan (acting as construction engineer for the Authority) which recited that the work referred to in the requisition had been "*actually performed.*" (Emphasis added.) As a consequence of this requisition and the attached certificate,[14] First National paid over $450,000 to Foundation (App. A, 1165-1166).

As soon as the $450,000 had been paid to Foundation (by reason of the various misrepresentations concerning the

[13] As pointed out previously, the work actually done by Foundation at the time the contract was signed came to $35,246.44.

[14] Tr. 1163-1167, 1275, 1327-1331; Ex. 6 (§ 406[c]); Tr. 324-331.

purpose of the payment), the second stage of the plan could be put into operation: *i.e.*, the kick-back payments by Foundation to Brady and others, in the guise of a finder's fee, a lawyer's fee and a subcontract.

Accordingly, the finder's fee was paid by Foundation to Plourde, who was acting as a straw for Brady (App. A, 1162). On the day of the closing, after Foundation had received and deposited the check for $450,000,[15] Foundation gave Plourde a check for $100,000. The following day, March 3, Plourde deposited this check in an account in his name at the Manufacturers Trust Company (Manufacturers Trust) in New York City (App. A, 1166).

On March 24, 1960, Plourde received a second check from Foundation, this time for $45,000,[16] which he also deposited in his account at Manufacturers Trust (App. A, 1167).[17] On the same day he had a meeting in a New York hotel with Brady, Broderick and Kiernan, at which there was an argument about how the money was to come out of Plourde's account. Broderick testified as follows: "Mr. Brady wanted Plourde to give him the money, the finder's money in cash, and we refused, and I told Brady that I would not permit Plourde to do it. Brady then suggested or Brady then said that the money should be turned over by Plourde to [petitioner] Richard C. Simmers"[18] (Tr. 501).

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[15] The $450,000 was deposited by Foundation during banking hours on March 2, 1960 (Ex. 80; Tr. 1406-1408). Plourde was not given the $100,000 check until the late afternoon or evening of March 2, after banking hours (Tr. 480-483, 703).

[16] The total of the finder's fee was reduced from $150,000 to $145,000 because of early payment of the second installment (App. A, 1167, n. 15).

[17] Ex. 26; Tr. 492-507; Tr. 721-743.

[18] The following appears as footnote 14 in the opinion of the Supreme Judicial Court (App. A, 1167):

"The rather abrupt appearance on the scene of Simmers, and shortly thereafter of Gordon and one Craven, as replacements for

During the course of this meeting Brady signed a paper which said: "Maurice [*i.e.*, Broderick] pay proceeds of the check to [petitioner] Richard C. Simmers" (Ex. 19; Tr. 504-507). In response to this instruction, Plourde drew two checks payable to Simmers, totalling $140,000. These checks were destroyed by Kiernan at a later meeting in New York, on April 1, 1960, when the finder's fee was finally removed from Plourde's account (Tr. 728-743).

On April 1, 1960, petitioners Gordon and Simmers, who were law partners (App. A, 1167; Tr. 893, 895), and John J. Craven arrived in New York City and met Brady, Kiernan and Plourde. Craven, who, like Plourde, was to serve as a straw in transferring the finder's fee, had been enlisted by Gordon (Tr. 892-894). Thereupon both groups, with the exception of Brady, proceeded to Manufacturers Trust, where Plourde had deposited the finder's fee. On the way, Simmers purchased a briefcase in which $140,000 in cash was later carried from the bank (Tr. 894-895). When they arrived at Manufacturers Trust, Plourde drew a check to Craven for $140,000,[19] which was then cashed. When the bank produced the money (consisting of a hundred $1,000 bills and eighty $500 bills), Gordon, Simmers and the others retired to a small anteroom, where the money was counted (Tr. 756-759, 898-900). When the counting was complete, Simmers reached over and put the money in the briefcase which he had bought just before entering the

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Broderick and Plourde, is in part probably accounted for by a dispute between Broderick and Brady about Plourde. Brady wanted the 'finder's fee' to come to him from Plourde in cash, but Broderick did not wish to have Plourde left, as a result, with an income tax problem. Broderick also told Brady that the compensation which Brady proposed to give to Plourde for acting as a straw was too small."

[19] The difference of $5,000 between the $145,000 paid as a finder's fee and the $140,000 check drawn to Craven represents Plourde's fee for serving as a straw (App. A, 1167).

bank (Tr. 900). Kiernan, accompanied by Plourde, then carried the briefcase uptown, where they met Brady; and Kiernan and Brady counted the money again. When this counting was complete, the empty briefcase was given to Plourde. Later that day, Gordon gave Craven one of the $500 bills as payment for his assistance. In this manner the finder's fee paid to Plourde by Foundation was removed from Plourde's account and paid either to Brady or partly to Brady and partly to other members of the conspiracy (App. A, 1167-1168).

The second means for accomplishing the kick-back payments was the so-called attorney's fee. In April of 1960, in accordance with the predated attorney's fee letter (signed at The Foundation office on February 20, 1960), a check for $50,000, in payment of the first installment of the attorney's fee, was sent to Broderick. However, by this time there had been a change of plan: Gordon, and not Broderick, was to be the recipient of the attorney's fee. As a result, Broderick returned the check for $50,000 to Foundation with a letter in which he assigned his interest in the fee agreement to Gordon (Ex. 21; Tr. 518-523, 966). Subsequently Gordon received three checks from Foundation, totalling $100,000, in full payment of the attorney's fee (Exs. 42-44; Tr. 957-959). These checks were cashed or put through for collection. Part of the proceeds went to Gordon, and part (including five $10,000 bills) went to Simmers (Tr. 1537-1551). Neither Gordon nor Simmers performed legal services for Foundation[20] (App. A, 1168).

[20] Each of the following witnesses (everyone who would have occasion to know) testified that to his knowledge neither Gordon nor Simmers performed legal services for Foundation: Shea, attorney for Foundation (Tr. 1113-1114); Gallagher, attorney for Foundation (Tr. 1137); Thompson, chairman of the board of Foundation (Tr. 1023-1028); Ferrick, attorney for the Authority (Tr. 1559-1561).

The last device for making the kick-back payments was the so-called subcontract. On June 8, 1960, Foundation sent a check for $40,000 to Granite State, pursuant to a fictitious purchase order, ostensibly for the construction of four construction buildings at the garage site (Ex. 45; Tr. 959-960). On March 3, 1961, Foundation sent another check to Granite State, this time for $25,000, ostensibly for the construction of fences (Ex. 78; Tr. 1401-1402; Ex. 46, Tr 959-960). No work was done by Granite State in return for these payments (Tr. 1452-1454). In fact, Granite State was only a paper corporation, with no tangible assets (Tr. 463-464, 478-479, 531-534). The $65,000 paid to Granite State went to Gordon and Simmers (Tr. 1504-1531). Fictitious bills of Granite State in support of these payments were sent by Gordon and Simmers to Foundation (Ex. 76; Tr. 1395-1399; Ex. 78; Tr. 1401-1402). See App. A, 1168-1169.

By these means the kick-back payments were made by Foundation, in accordance with the understanding when the conspiracy was formed.

Summary of Argument.

A. There is no merit in petitioners' contention that the grand jury was not impartial. There is no evidence of bias on the part of any grand juror against either petitioner or any other defendant, and there was nothing inflammatory or unfair in the newspaper stories referred to in the Summary of Record. The impartiality of the grand jurors is assured by the oath which they take and by their random selection to hear a wide variety of cases (all felony prosecutions in Massachusetts must be initiated by grand-jury indictment).

B. There is no merit in petitioners' contention concerning possible bias on the part of the trial jury, since the trial

judge took full precautions to insure that the jurors chosen would be indifferent. No question under the United States Constitution is raised by Mass. G.L. (Ter. Ed.) c. 234, § 28, which permits the trial court, in its discretion, to conduct the voir dire examination of prospective jurors itself, or to delegate the examination to counsel.

C. There was abundant ground for founding territorial jurisdiction in the Commonwealth of Massachusetts and venue in Suffolk County. The initial false pretenses, which culminated in the payment of Authority money to Foundation, took place in Boston. The Authority, First National (trustee of the construction fund) and the garage itself are located in Boston. Although the $450,000 was transferred from the Authority to Foundation in New York City, part of the proceeds of the larceny was later brought into Massachusetts and deposited in banks in Lawrence and Andover.

D. No question is raised under the United States Constitution by the action of the Supreme Judicial Court in overruling a previous decision which had clearly misconstrued the plain meaning of a venue statute for false pretenses. Even if the action of the court amounted to a change in the rule of venue, instead of the correction of an erroneous construction adopted previously, no question of an *ex post facto* law would be presented; nor would this result so violate the fundamental principles of legal proceedings as to constitute a denial of due process. In any event, petitioners waived this question by failing to argue it before the Supreme Judicial Court.

E. In section V of petitioners' Reasons for Granting the Writ it is contended that the evidence was insufficient to establish various elements of the crimes of which petitioners were convicted (on the theory that questions of due process and *ex post facto* laws are raised thereby). However, the evidence was sufficient to support the convic-

tions on each indictment. Even if we assume petitioners' contention *arguendo*, the matters raised would be questions of state law only and would not present questions under the United States Constitution.

F. The petition requests that certiorari issue to the wrong court. In felony prosecutions in Massachusetts, judgment is entered in the Superior Court. The taking of an appeal does not transfer the case to the Supreme Judicial Court, but only the questions of law which are raised. The rescript from the Supreme Judicial Court does not represent a judgment, but only a direction as to the judgment to be entered in the Superior Court.

Argument.

A. There is No Evidence of Bias on the Part of the Grand Jury.

Section I of petitioners' Reasons for Granting the Writ has to do with the news reporting concerning this case and its possible effect on the deliberations of the grand jury. In their argument petitioners assume that the news reports caused the grand jurors to be prejudiced, and they say that a question of due process thereby is raised.

However, the only reference to the allegedly prejudicial publicity in this section of the petition appears at the top of page 28, as follows: "In the instant case, the headlines printed in the Summary of the Record (R. 40-44, 80-90, 159-162)[21] show that the publicity emanated from the office of the Attorney General." In the first place, an examination of the pages referred to in the Summary of Record demonstrates that the words just quoted are not a correct state-

[21] The three different sections of the Summary of Record referred to consist principally of duplications of the same newspaper leads.

ment of fact; there is little if anything in these pages to show that publicity "emanated from the office of the Attorney General."[22] Moreover, there is no mention of either petitioner by name in these newspaper leads, prior to the return of the indictments. Nor is there any statement or inference in these newspaper leads, prior to the return of the indictments, that either petitioner was guilty of a crime. Therefore there is no support in the record for the contention that pre-indictment publicity was prejudicial to petitioners.

In *Beck* v. *Washington,* 369 U.S. 541, certiorari was granted on the question, among others, of whether there

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[22] The newspaper leads which would appear to have come from the office of the Attorney General are the following:

(*a*) "Garage Board warned of grand jury action," "McCormack (then Attorney General) demands files," Boston Herald, March 26, 1962 (R. 42, 82, 161). This statement appeared at the beginning of the investigation, more than a month before the grand jury was convened (May 3, 1960) (R. 86) and more than two months before the return of the indictments (May 31, 1960) (R. 90, 162). There is nothing in this statement prejudicial to either of the petitioners or to anyone else. Certainly it was proper for the Attorney General to call upon the Authority to produce its records for examination by his staff before the matter was presented to the grand jury.

(*b*) "McCormack says thousands paid, no questions asked, garage deals 'fantastic'," Boston Herald, March 30, 1962 (R. 43, 82, 161). This statement also was made at the beginning of the investigation, more than a month before the grand jury was convened and more than two months before the return of the indictments. The statement does not refer to the petitioners or to anyone else by name, and it does not accuse anyone of a crime.

(*c*) "Furcolo (former governor of Massachusetts) given clean bill by McCormack," Boston Herald, April 10, 1962 (R. 43, 84, 162). Obviously this statement was not prejudicial to petitioners.

(*d*) "Brady apologizes for statements McCormack tells ex-garage head he could be defendant," Boston Globe, May 14, 1962 (R. 88). This statement by McCormack (not prejudicial to petitioners) was in reply to inflammatory statements by Brady (R. 88): "Brady faces contempt action for blast at grand jury"; "Brady apologizes for calling garage probe 'white wash'."

was a requirement under the United States Constitution that state grand juries be impartial (365 U.S. 866). On consideration of the case it was decided that there was no showing of prejudice (therefore, the Court did not reach the question on which certiorari was granted).

If the newspaper and other publicity in *Beck* v. *Washington* did not support a claim of prejudice, no such claim can be made in the present case. In the *Beck* case the defendant had been summoned before the Select Committee on Improper Activities in the Labor or Management Field of the United States Senate and had been questioned, among other things, about his dealings with union funds. On some 210 occasions, in reply to questions from the committee, Beck invoked his privilege against self-incrimination. These hearings, and Beck's refusal to testify, were widely publicized, especially in Kings County in Washington, where the grand jury that indicted Beck was convened. Less than three weeks before this grand jury was convened, Beck was indicted by a federal grand jury for tax fraud; and this fact also was widely publicized. Furthermore, the chairman of the Senate committee made this statement, while the state grand jury was deliberating: "The Committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses."

It was further contended in the *Beck* case that the state court had not taken sufficient precautions to insure that the grand jury would be impartial.[23] However, after re-

[23] In Washington prosecution by grand jury indictment is no longer mandatory, although it may be restorted to at the discretion of the prosecution (generally when the subpoena power is required for the investigation). Therefore, in Washington grand jurors are convened to hear a particular case and may be instructed beforehand with respect to that case. In Massachusetts, however, all felony prosecutions must be initiated by grand jury indictment (article 12 of the Declaration of Rights of the Massachusetts Con-

viewing the procedure for selecting the grand jury, this Court concluded that there had been no showing of bias.

In the present case we submit, first, that the pre-indictment publicity (certainly less damaging than in the *Beck* case) cannot be considered prejudicial; second, we say that the procedure for selecting the grand jury (as this Court found to be true in the *Beck* case) insured that the grand jury would be free from bias. Each grand juror in the present case took the following oath, as required by Mass. G.L. (Ter. Ed.) c. 277, § 5:

> "You, as grand jurors of this inquest for the body of this county of (Suffolk), do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge; the commonwealth's counsel, your fellows' and your own, you shall keep secret; you shall present no man for envy, hatred or malice, neither shall you leave any man unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God."

Moreover, because this grand jury was selected at random for general grand jury service, and without forewarning that they would hear this case, it is unlikely that they had formed preconceived notions as to the guilt or innocence of petitioners, or of anyone else who was later named in the indictments. On the other hand, there is a danger in the particularity of the instructions given to the grand

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stitution). Therefore in Massachusetts grand juries are convened from time to time in the various counties, to hear whatever cases may be presented while they are sitting. Since the court does not know in advance what cases will be presented, Massachusetts grand juries are given general instructions and are not instructed about particular cases.

jurors in the *Beck* case, as this Court recognized. In reply to the defense argument that the Washington court failed to instruct the grand jurors about the Fifth Amendment, or to admonish them to disregard news reports, this Court said (369 U.S. 541, 548):

> "Discussion along such lines might well have added fuel to the flames which some see here."

It should be borne in mind that there is no evidence or allegation of prejudice on the part of any particular member of the grand jury. As this Court said in *Darcy* v. *Handy*, 351 U.S. 454, 462:

> ". . . it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

B. Conduct of the Voir-Dire Examination of Trial Jurors by the Judge does Not Raise a Constitutional Question.

The next matter raised by petitioners has to do with the voir dire questioning of prospective trial jurors. Mass. G.L. (Ter. Ed.) c. 234, § 28, provides in part as follows:

> ". . . the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein . . ."

In this case the trial judge asked all prospective jurors the questions required by the cited statute and other questions that were suggested by the responses which he received. As the Supreme Judicial Court said (App. A, 1159): "The judge . . . interviewed each juror separately in open court, informed each of the essentials of the indictments, inquired of each as to the matters embraced in G.L. c. 234, § 28, so far as relevant, and in addition propounded, as the particular situation commended, additional inquiries, including some suggested by counsel. In all respects the judge was meticulous to insure the empanelling of a jury free from bias." Each person selected for the jury had stated, in reply to questions put by the trial judge, that he or she had no preconceived opinion as to the innocence or guilt of the petitioners. Anyone expressing bias or preconceived notions of guilt or innocence was excused by the trial judge.

The petitioners' position as to this matter, apparently, is that conduct of the voir dire examination of prospective jurors by the trial judge, instead of permitting this examination to be conducted by defense counsel, is a denial of due process. This position, we submit, is without merit. The procedure adopted by the trial judge has long been permissible in Massachusetts (App. A, 1159). When a trial judge questions the jurors conscientiously to make sure that they are free from bias, as the trial judge did in this case, it cannot be said that his refusal to permit the examination to be conducted by counsel so violates the fundamental principles of legal proceedings as to constitute a denial of due process. *Buchalter* v. *New York,* 319 U.S. 427.[24]

[24] Nine other states and the Federal Rules of Criminal Procedure (Rule 24[a]) have provisions similar to that of Massachusetts concerning the voir dire examination of jurors (Appendix D to the Petition, pp. 69-73).

The same question was raised in *Commonwealth* v. *Geagan*, 339 Mass. 487, 159 N.E. 2d 870 (1959); cert. den. 361 U.S. 895, 80 S.C. 200, 4 L. Ed. 2d 152 (1960). After the petition for certiorari had been denied by this Court, following the state court proceedings, the defendant in *Commonwealth* v. *Geagan* raised the same question again, among others, in a habeas corpus proceeding in the Federal District Court. *Geagan* v. *Gavin*, 181 F. Supp. 466 (1960). In denying the petition for habeas corpus, Wyzanski, J., said, concerning the voir dire examination of the prospective jurors (which was substantially the same as that in the instant case), at page 474:

> "Nor does this Court regard the actual questions put by Judge Forte as inadequate. They covered not only the grounds specified by Mass. G.L. (Ter. Ed.) c. 234 § 23, but also other points. They were calculated to discover whether a juror was free from prejudice caused by pre-trial publicity. These questions satisfied the Massachusetts Supreme Judicial Court and they satisfy the demands of the due process clause."

The decision of the District Court was affirmed on appeal, *Geagan* v. *Gavin*, 292 F. 2d 244 (1961); and certiorari was denied again, 370 U.S. 903, 82 S.C. 1247, 8 L. Ed. 2d 399 (1962).

Accordingly, we submit that the question raised in this case concerning the voir dire examination of the trial jurors is not sufficient to support the petition for certiorari.[25]

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[25] The question concerning Massachusetts practice in the voir dire examination of prospective jurors was raised as issue No. 4 in the first petition for certiorari (No. 421, October Term, 1959; *Geagan* v. *Massachusetts*, 361 U.S. 895) and as issue No. 3 in the second petition for certiorari (No. 394, October Term, 1961, 370 U.S. 903).

C. There was Abundant Ground for Founding Territorial Jurisdiction in Massachusetts and Venue in Suffolk County.

The larceny indictment (R. 1-2) is in the general language provided by statute (G.L. [Ter. Ed.] c. 277, § 79), which permits proof of larceny in any form (G.L. [Ter. Ed.] c. 277, §§ 39, 41). Under this indictment it was proper to prove a violation of G.L. c. 266, § 33(1).[26] *Commonwealth* v. *Kelley,* 184 Mass. 320, 322-324. *Commonwealth* v. *King,* 202 Mass. 379, 386-391. *Commonwealth* v. *Green,* 302 Mass. 547, 553-554. In fact, an offense under this section was charged specifically by the substitute bills of particulars (R. 74-76), which allege that the defendants "with intent to defraud obtained by false pretenses the *making* of a check . . ." (Emphasis added.) *Commonwealth* v. *Iannello,* 344 Mass. 723, 726-727. Accordingly, the offense defined in G.L. c. 266, § 33 (1), was part of the larceny case. Therefore, with respect to the questions of venue and jurisdiction for the larceny indictment, reference may be made to venue and jurisdiction for the offense defined in this section.

Since there is no statutory venue for G.L. c. 266, § 33 (1), the common-law rule applies, which is that venue will lie in the county where the offense was committed. *Commonwealth* v. *Parker,* 2 Pick. 550, 554. *Commonwealth* v. *Quin,* 5 Gray 478, 480. *Crocker* v. *Justices of the Superior Court,* 208 Mass. 162. The crime is committed when someone "with intent to defraud, *obtains by a false pretence the*

[26] In pertinent part, this statute provides as follows: "Whoever, with intent to defraud, obtains by a false pretence the making . . . of a bill of exchange . . . shall be guilty of larceny." It is noteworthy that this offense does not require a showing that the bill of exchange changed hands; the crime has been committed when the bill of exchange is *made.*

making . . . of a bill of exchange . . ." (Emphasis added.) If the bill of exchange is a check, the crime has been committed when the check has been made out and signed, *which in this case was at the main office of First National in Boston* (Tr. 670-671, 1214-1215). Furthermore, Authority resolutions approving various documents (*e.g.*, the proposed construction contract between the Authority and Foundation), which the jury could have found were misrepresentations and without which the jury could have found that the check could not have been made, were adopted at an Authority meeting in Boston. Every element of the offense defined in G.L. c. 266, § 33 (1), occurred in Boston. Therefore venue properly was laid in Suffolk County. Obviously, there is no problem in founding jurisdiction in Massachusetts for this offense.[27]

Therefore the argument made by petitioners (section III of Reasons for Granting the Writ) that there was no evidence of a larceny committed in Massachusetts (or for which venue properly would lie in Suffolk County) is without merit.

Petitioners argue that the larceny terminated when the $450,000 was paid to Foundation in New York and when this money was mingled with the general funds of Foundation. They are forced to take that position for this reason: The later payments made by Foundation to Gordon and Simmers (the attorney's fee and the subcontract payments)

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[27] Under the indictment and substitute bills of particulars the Commonwealth also could prove an offense under G.L. c. 266, § 30, which provides in pertinent part that "Whoever . . . with intent to defraud obtains by a false pretence . . . the property of another . . . shall be guilty of larceny . . ." In this case venue of the crime defined in this section was properly laid in Suffolk County (and jurisdiction in Massachusetts). Our argument in support of this position appears in part D of the Argument *infra*, in reply to section IV of Reasons for Granting the Writ contained in the petition.

were deposited by them in Massachusetts banks (Tr. 1495-1531; Tr. 1537-1551). The venue section for false pretenses which petitioners admit applies (G.L. [Ter. Ed.] c. 277, § 58)[28] provides for venue wherever the defendant "had possession of the property alleged to have been stolen." Therefore, unless petitioners contend that the money which they received from Foundation and deposited in Massachusetts banks was not "property alleged to have been stolen," they must concede that Massachusetts had jurisdiction of the larceny charged. However, in arguing that the crime terminated when the money was paid to Foundation, petitioners overlook the long-standing Massachusetts rule that larceny is a continuing offense until the asportation is complete. *Commonwealth* v. *Rand*, 7 Met. 475, 477. *Commonwealth* v. *Parker*, 165 Mass. 526, 538-539. Furthermore, the Supreme Judicial Court has found that (App. A, 1173):

> "It is clear that the criminal design, from its inception, contemplated that the funds, through Foundation, should reach Brady's hands or the hands of persons designated by him, and that only when that result had been achieved would the enterprise, i.e., the larceny, be complete. And, indeed, it was only when that result was achieved that the essential larcenous nature, i.e., the animus furandi, of the plan became clear and demonstrable. Simmers and Gordon knowingly coöperated to advance the plan through that decisive stage. They accomplished with animus furandi the asportation of the funds both in New York and in Massachusetts."

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[28] Petitioners argue that G.L. (Ter. Ed.) c. 277, § 58, is the only venue section for false pretenses. However, the Supreme Judicial Court held in this case (App. A, 1175-1177) that G.L. (Ter. Ed.) c. 277, § 59 also applies.

In any event, even if we assume petitioners' contention *arguendo* that the Massachusetts court misapplied state law in founding venue for the larceny indictment in Suffolk County, no question arises under the United States Constitution. There are sufficient connections between what took place in this case and the state of Massachusetts[29] to make a finding of jurisdiction in Massachusetts consistent with the fundamental principles of legal proceedings and therefore in accord with due process. *Buchalter* v. *New York*, 319 U.S. 427. Although a change in the established rule as to Massachusetts *jurisdiction* of the larceny charge might raise an *ex post facto* question[30] (*Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S.C. 1697; *Beazell* v. *Ohio*, 269 U.S. 167, 46 S.C. 68), a change in the rule as to the county in Massachusetts in which *venue* of this crime may be laid would not. *Cook* v. *United States*, 138 U.S. 157, 183, 11 S.C. 268, 275. *Gut* v. *State of Minnesota*, 9 Wall. 35, 37.

D. No Constitutional Question is Raised by the Action of the Supreme Judicial Court in Overruling a Prior Decision which had Clearly Misapplied a State Statute Concerning Venue.

In part IV of the petition questions are raised under the United States Constitution concerning the holding by the Supreme Judicial Court that the venue provision of

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[29] The Authority, First National (construction fund trustee) and the garage are located in Boston. False pretenses were made in Boston. The $450,000 check to Foundation was made and signed in Boston. Proceeds of the larceny were deposited in banks in Andover and Lawrence, both in Massachusetts.

[30] As pointed out previously, no substantial question can be raised as to jurisdiction in Massachusetts of the larceny charge.

G.L. (Ter. Ed.) c. 277, § 59,[31] applies to this case.[32] This argument is based on the fact that in 1905 the Supreme Judicial Court held (*Commonwealth* v. *Friedman,* 188 Mass. 308) that the predecessor of this statute did not apply to the predecessor of what is now Massachusetts General Law, c. 266, one of the larceny statutes under which the petitioners in this case were charged.[33] In deciding the present case, the Supreme Judicial Court, after careful consideration, reversed the holding in *Friedman* and ruled that the venue statute in question does apply to G.L. c. 266, § 30 (App. A, 1175-1177). The petitioners now assert that the overruling of *Friedman* raises due process and *ex post facto* questions.

In reply to this argument, it should be noted that the first time this argument has been made is in the petition to this Court. In its brief (and in oral argument) the Commonwealth had argued that *Friedman* should be overruled (App. A, 1176). Under the Massachusetts practice (Rule 16 of the Rules for the Regulation of Practice before the Full Court of the Supreme Judicial Court),[34] petitioners had the right to file a reply brief to answer this argument. No reply brief was filed, and nothing was said in the oral

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[31] This statute provides as follows:

"The crime of obtaining money or a personal chattel by a false pretence . . . may be alleged to have been committed, and may be prosecuted and punished, in any county where the false pretence was made, written or used, or in or through which any of the property obtained was carried, sent, transported or received by the defendant."

[32] App. A, 1175-1177.

[33] Petitioners were also charged with the forms of larceny defined in G.L. c. 266, §§ 33(1) and 34. *Commonwealth* v. *King,* 202 Mass. 379, 386-391. *Commonwealth* v. *Kelley,* 184 Mass. 320, 322-324. *Commonwealth* v. *Iannello,* 344 Mass. 723, 726-727 (R. 74-76).

[34] See Appendix I attached to this brief.

arguments about constitutional questions that might be raised by the overruling of *Friedman*.[35] Under Massachusetts practice the failure to brief and argue the questions constituted a waiver (Rule 13 of the Rules for the Regulation of Practice before the Full Court of the Supreme Judicial Court).[36]

The reason for this rule is well illustrated by what happened in this case. The Commonwealth made three arguments before the Supreme Judicial Court in support of a finding that venue had been established in this case.[37] The first and third arguments had nothing to do with the ruling in the *Friedman* case. Only the second argument concerned the holding in *Friedman*. In its opinion the Supreme Judicial Court dealt only with the venue question concerning the *Friedman* case, and made no reference, one way or the other, to the other arguments made by the Commonwealth in support of venue. Indeed, since the Court was persuaded that *Friedman* should be overruled, and since no contrary argument had been made by petitioners either by reply brief or by oral argument, there was no reason for the Court to concern itself with the other arguments about venue. If the question which the petitioners now raise (about the overruling of *Friedman*) had been argued to the Supreme Judicial Court, that Court would have had the opportunity to deal with the other venue arguments made by the Commonwealth, to determine whether venue had been established regardless of whether *Friedman* was overruled. Therefore we suggest that in this case there is special force to the rule that failure to make an argument at the appropriate time constitutes a waiver.

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[35] See pages 37-38 of the petition.

[36] See Appendix I attached to this brief.

[37] Reference to these arguments appears at page 37 of the petition, n. 16.

Moreover, the petitioners' argument concerning the overruling of *Friedman* is without merit. The principal case cited by them in support of their argument is *Bouie* v. *City of Columbia*,[38] 378 U.S. 347, 84 S.C. 1697. In the *Bouie* case there was a statute which made it a crime *to enter* upon premises *after being notified of a prohibition against such entry.* The state court held that this statute would support a conviction of defendants *who were invited to enter* upon certain premises but then *refused to leave,* after being directed to do so. Clearly, this was such a strained construction of a criminal statute as to amount to *ex post facto* law-making by the court. In the present case the situation is entirely different. Here we have a venue statute which, on its face, clearly applies to the larceny statute. As the Supreme Judicial Court said: "If this were a case of first impression we should have no hesitation in reaching the conclusion that by the plain terms of G. L. c. 277, § 59, the Commonwealth's contention is correct" (App. A, 1175). In overruling the *Friedman* case the Supreme Judicial Court was not attempting to make law, but was merely correcting an earlier decision which had misconstrued the plain meaning of a statute and had overlooked a lengthy and uniform legislative history (App. A, 1176-1177).

Moreover, a change in the law of a state concerning the county in which venue may be laid (assuming the state had

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[38] This Court has held that the *ex post facto* clause of the United States Constitution is directed against legislative action and does not reach erroneous or inconsistent decisions by a state court. *Frank* v. *Mangum,* 237 U.S. 309, 35 S.C. 582. *Ross* v. *Oregon,* 227 U.S. 150, 33 S.C. 220. This rule appears to have been modified by the recent decision in *Bouie* v. *City of Columbia, supra.* However, *Bouie* applies to "*unforeseeable*" judicial action. In view of the clear meaning of the venue statute concerned in this case, the decision by the Supreme Judicial Court in this case was not "unforeseeable."

jurisdiction over the crime when it was committed) does not present a question under the United States Constitution.[39]

E. The Evidence was Sufficient to Support the Convictions.

In section V of the petition it is argued that the evidence was insufficient, in several respects, to support the convictions. The short answer to this argument is that it concerns alleged errors in the application of state law which do not present questions under the United States Constitution. *Buchalter* v. *New York*, 319 U.S. 427.

Furthermore, in each respect referred to by petitioners the evidence was clearly sufficient to support the convictions.

As to the criminal intent of Simmers and Gordon, there was evidence that they received $165,000 from Foundation ($100,000 for the legal fee and $65,000 for the subcontract) for which they knew that no services had been rendered. They produced Craven to act as a straw in transferring the finder's fee; they were present when the finder's fee, in cash, was counted at the bank; Simmers purchased the briefcase in which the cash was carried from the bank. In addition to receiving the payments under the so-called attorney's fee and subcontract, they sent false statements and bills to Foundation to support these payments. Clearly they were acting, with guilty knowledge, in concert with the other conspirators. Nor can they escape liability for the larceny merely because they were not participants in one part (false pretenses) of a crime that was committed in several stages. The law in Massachusetts is that the crime of larceny is a continuing offense until the asportation is

[39] See section C of this argument, *supra*, pp. 22-25.

complete and that knowing participants in one or more aspects of the commission of the crime are guilty of the entire crime (App. A, 1172-1173).

As to the element of reliance on the false pretenses, the evidence was that under the Bond Resolution (Ex. 6; Tr. 324-331) the construction fund trustee was obligated to make payments upon receipt of a requisition from the Authority certified by the construction engineer. Accordingly, requisition 1 (calling for the payment to Foundation of $450,000), which had been signed by defendant Brady and certified by defendant Kiernan, caused the payment to be made. It is of no consequence that one or more members of the Authority may have been parties to the conspiracy, since the knowledge of a fraudulent agent is not imputed to his principal. *Commonwealth* v. *Mulrey*, 170 Mass. 103, 106. See App. A, 1171-1172.

Finally, petitioners contend that the indictments were defective in naming the Authority instead of First National as to the victim of the crimes. This argument is entirely without merit (App. A, 1173-1175).

F. The Petition Requests that Certiorari Issue to the Wrong Court.

This case was tried under the provisions of G.L. c. 278, §§ 33A-33G (R. 5). The entry of the appeal did not transfer the case from the Superior Court to the Supreme Judicial Court, but only the law questions raised. G.L. c. 278, § 33E. The final judgment was entered in the Superior Court. The rescript from the Supreme Judicial Court is not a judgment, but merely a direction as to what judgment should be entered in the Superior Court. *Gray* v. *Cook*, 135 Mass. 189, 190.

Conclusion.

For the reasons presented in section F of the Argument herein the petition for certiorari should be dismissed. Alternatively, for the reasons presented in the other sections of our Argument, the petition should be denied.

Respectfully submitted,

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[Appendix follows.]

Appendix I.

RULES FOR THE REGULATION OF PRACTICE BEFORE THE FULL COURT OF THE SUPREME JUDICIAL COURT (1952, AS AMENDED NOVEMBER 5, 1962).

13.

NO ORAL ARGUMENT WITHOUT BRIEF EXCEPT BY LEAVE OF COURT.

No oral argument shall be heard, except by special permission of the court, in behalf of a party for whom no brief has been filed as provided in these rules. The court need not pass upon questions or issues not argued in briefs. Nothing argued in a brief shall be deemed to be waived by a failure to argue orally.

16.

TIMES FOR FILING BRIEFS.

(A) Except as provided elsewhere in this rule, the brief of the party entering a case in the full court shall be filed not later than the twenty-eighth day after entry of the case, and briefs of other parties shall be filed not later than the forty-ninth day after such entry. If the last day for filing any such brief falls on a legal holiday, the brief may be filed on the next working day. Not later than one day (exclusive of a Saturday, Sunday, or holiday) before the first day of the sitting at which the case is in order for argument, any party may file a brief in reply. Each party shall file with his brief a certificate of mailing or delivering a copy to counsel for each other party. Twenty-five copies of each brief shall be filed.

(B) If the time for filing the brief for the party entering a case falls between the twenty-seventh day prior to the May sitting and August 31, the parties may agree to extend the time for filing such brief to a date not later than

the third Monday of September and the briefs of other parties twenty-one days later. Such a case shall not be argued before the first Monday of November unless the party entering the case is required by such agreement to file his brief prior to August 15. Such agreement shall be filed with the clerk not later than seven days after entry of the case.

(C) No brief may be filed at any other time except as may be provided by agreement filed with the clerk and approved by a justice.